No. 84-249

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

ROGER L. SPENCER and SHIRLEY L. SPENCER,
Petitioners,

v.

SOUTH CAROLINA TAX COMMISSION, et al.,
Respondents.

On Writ of Certiorari to the
Supreme Court of South Carolina

BRIEF OF AMICI CURIAE
In Support of Respondents

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INTEREST OF AMICI CURIAE

The primary interest of the amici states[1/] in this case is one that

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1/ The states participating in this brief as amici curiae are: Alaska, Arkansas, Colorado, Idaho, Iowa, Kentucky, Maryland, Massachusetts, Minnesota, Nevada, North Dakota, New Hampshire, Ohio, Pennsylvania, and South Dakota.

has long been recognized by this Court as fundamental--"the imperative need of a State to administer its own fiscal operations. . . . 'especially when the state . . . has set up its own adequate procedure for securing to the taxpayer the recovery of an illegally collected tax.'"[2/] The "compelling nature" of this interest, Rosewell v. LaSalle National Bank, 450 U.S. 503, 527 (1981), is based on both practical and theoretical considerations. States are, of course, dependent on the efficient and expeditious collection of taxes for their day-to-day operation.[3/] Even more

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2/ Tully v. Griffin, Inc., 429 U.S. 68, 73 (1976) (quoting from Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293, 298 (1943)).

3/ States derive most of their revenue from state taxes. Advisory Comm'n on

(footnote continued)

fundamentally, the states' ability to administer their systems of tax collection, free from undue federal interference, is essential to their sovereign status within our federal system. Fair Assessment in Real Estate Association v. McNary, 454 U.S. 100, 102 (1981).

To require state courts to provide relief under 42 U.S.C. § 1983 for claims based upon allegedly unconstitutional state taxes "would disrupt the process of local taxation and create burdensome and unnecessary chaos in local government." Backus v. Chilivis, 236 Ga. 500, 224 S.E.2d 370, 375 (1976). In addition to the potential for damages and attorney's fees that "would place 'enormous

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(footnote continued)

Intergovernmental Relations, Significant Features of Fiscal Federalism 53, 56 (1980), cited in Rosewell, 450 U.S. at 527.

fiscal burdens on the States,'" cf. Quern v. Jordan, 440 U.S. 332, 345 n. 16 (1979), "the very maintenance of the [§ 1983] suit itself would intrude on the enforcement of the state [tax] scheme," Fair Assessment, 454 U.S. at 114, by permitting aggrieved taxpayers to evade the mechanisms established by state legislatures for resolving tax disputes.

A second interest shared by the amici states is in the independence and integrity of their state judiciaries. While in no way questioning the obligation of state courts to uphold and enforce federal law, as the South Carolina Supreme Court did here, the amici ask the Court to recognize their prerogative, under our federal system, to determine how those rights are to be enforced. In so doing, the Court is urged to consider

the enormous and unnecessary burden that would be imposed on state courts[4/] by requiring them to adjudicate § 1983 claims in tax cases where state law already provides an adequate, but less burdensome, remedy for violations of federal law.[5/] As noted by one commentator, the problem should be viewed

> as one of accommodation between the somewhat conflicting constitutional purposes of securing the effective enforcement of federally created rights in the manner which

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4/ Affirming the lower court's judgment in this case would not increase the burden on federal courts, since, as recognized by petitioners, Petitioners' Brief at 46-47, this type of case could not be brought in federal court.

5/ Hart, The Relations Between State and Federal Law, 54 Colum. L. Rev. 489, 507-08 (1954); Sandalow, Henry v. Mississippi and the Adequate State Ground: Proposals for a Revised Doctrine, 1965 S. Ct. Rev. 187, 207 n. 187.

> to Congress seems proper and, at the same time, maintaining the states as viable political units with the ability to direct the ends for which their judicial systems may be used.

Note, State Enforcement of Federally Created Rights, 73 Harv. L. Rev. 1551, 1555 (1960).

Accordingly, the amici urge this Court, in resolving the important questions presented by this case, to adhere to the principles of "Our Federalism," under which

> there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

Younger v. Harris, 401 U.S. 37, 44 (1971). As in Fair Assessment, 454 U.S.

at 102, "[t]his Court [should continue to] . . . recognize[] the important and sensitive nature of state tax systems and the necessity for . . . restraint when deciding cases that affect such systems." As will be shown below, adherence to those principles requires that the decision of the South Carolina Supreme Court be affirmed.[6/]

SUMMARY OF ARGUMENT

The threshold question presented by this case is whether it is an action to enforce the provisions of 42 U.S.C. § 1983, giving rise to eligibility for attorney's fees under 42 U.S.C. § 1988. The legislative history of § 1983 and of 28 U.S.C. § 1341 demonstrates that

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6/ In contrast to the larger interests shared by the amici and the respondents, the sole interest of the petitioners in this case is in having their attorney's fees paid by the state.

Congress did not intend § 1983 to be used as a remedy for unconstitutional taxation where, as here, state law provides an adequate remedy for such constitutional claims. Nor was § 1983 intended to be used to enforce the Privileges and Immunities Clause or to apply to actions against a state. Since this case therefore cannot be characterized as an action to enforce the provisions of § 1983, no attorney's fees were available under § 1988. Pp. 10-33.

Even if this tax case were cognizable under § 1983, the South Carolina court was not required to adjudicate petitioners' § 1983 claim. Although the Supremacy Clause requires state courts to enforce substantive federal law, it does not require that they use § 1983 to do so where state law provides an adequate remedy for federal constitutional

claims. Congress did not intend to require state courts to entertain § 1983 claims in tax cases against the state; and, even if Congress did so intend, the South Carolina court had several "valid excuses" for declining to do so, including the state's sovereign immunity, its sovereign status under the Tenth Amendment, and the fact that even the federal courts would not have been required, or permitted, to adjudicate petitioners' § 1983 claim. Pp. 33-57.

Finally, even if the South Carolina court was required to entertain petitioners' § 1983 claim, it acted within the scope of its discretion in declining to award attorney's fees under 42 U.S.C. § 1988. Congress expressly intended to give trial courts the discretion to deny

fees in appropriate circumstances. Denial of fees was particularly appropriate here since petitioners' § 1983 claim was entirely superfluous to their success in obtaining a tax refund and since their interests in this matter were more in the nature of property than personal rights. Pp. 57-63.

ARGUMENT

I. AN ACTION SEEKING A REFUND OF STATE TAXES ON THE GROUND THAT THE APPLICABLE STATE STATUTE VIOLATES THE PRIVILEGES AND IMMUNITIES CLAUSE IS NOT AN ACTION TO ENFORCE THE PROVISIONS OF 42 U.S.C. § 1983, GIVING RISE TO ATTORNEY'S FEES UNDER 42 U.S.C. § 1988.

The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, applies only to actions or proceedings to enforce the provisions of 42 U.S.C. § 1983 (and other specified statutes not at issue here). Where § 1983 does not

afford a remedy, attorney's fees are not available under § 1988. See, e.g., Smith v. Robinson, 104 S. Ct. 3457, 3468-74 (1984). Therefore, although the ultimate question raised by this case is whether the South Carolina Supreme Court properly declined to award fees under § 1988, the threshold question is whether this action was cognizable under § 1983.[7/]

In recent cases defining the scope of § 1983, this Court has clarified that § 1983 does not always provide a remedy for the deprivation of all federal rights.[8/] Rather, in determining

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7/ As discussed in section III, infra, even if this action could be viewed as one to enforce the provisions of § 1983, the court nevertheless was justified in declining to award fees on other grounds.

8/ See Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1 (1981); Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1 (1981); Smith v. Robinson, 104 S. Ct. at 3468-74.

whether § 1983 applies, "[t]he crucial consideration is what Congress intended." Smith v. Robinson, 104 S. Ct. at 3469-70. As will be shown here, Congress did not intend § 1983 to be used as a remedy in this type of case. Section 1983 was not intended to apply to cases seeking refunds of state taxes where an available state law remedy is adequate to redress any violations of federal constitutional rights. Nor was § 1983 intended to provide a remedy for violations of the Privileges and Immunities Clause or to apply to any actions against a state.

A. Congress Did Not Intend § 1983 to Be Used as a Remedy for Unconstitutional Taxation Where State Law Provides an Adequate Remedy for Such Constitutional Claims.

One exception to the otherwise broad reach of § 1983 that has been repeatedly

recognized by this Court is that § 1983 does not apply where the remedial devices provided in another federal statute are sufficiently comprehensive to demonstrate congressional intent to preclude suits under § 1983. Pennhurst, 451 U.S. at 28; Sea Clammers, 453 U.S. at 13-21; Smith v. Robinson, 104 S. Ct. at 3468-74. Where such congressional intent is found to exist, this exception applies regardless of whether the federal right that the plaintiff seeks to enforce is statutory, Pennhurst; Sea Clammers, or constitutional. Smith v. Robinson. Similarly, actions seeking tax refunds under § 1983 are precluded because of the congressional intent that adequate state-law remedies be the exclusive means for resolving state tax disputes.

Examination of the legislative history of § 1983 reveals that it was originally intended to provide "a uniquely federal remedy," Mitchum v. Foster, 407 U.S. 225, 239 (1972), for civil rights violations where state remedies were either inadequate or unavailable. Monroe v. Pape, 365 U.S. 167, 174-80 (1961). Indeed, this legislation, which was originally enacted as one of the Ku Klux Klan Acts following the Civil War, was premised on the assumption by Congress that state remedies for enforcing federal law were inadequate. Haring v. Prosise, 462 U.S. 306 (1983).

However, in a more recent and specific enactment, 28 U.S.C. § 1341,[9/]

9/ That statute provides: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection

(footnote continued)

Congress expressly indicated that no federal court remedy is necessary (or even permissible) in cases challenging state taxes where an adequate remedy is available in state court. Fair Assessment, 454 U.S. at 116. Even where taxpayers raise constitutional objections to a state tax, § 1341 and its underlying principles of comity require that "[s]uch taxpayers must seek protection of their federal rights by state remedies," rather than by § 1983.[10/]

Although § 1341 directly precludes only federal court jurisdiction, the

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(footnote continued)

of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

10/ Id.; see also, e.g., Werch v. City of Berlin, 673 F.2d 192, 194 (7th Cir. 1982); Bland v. McHann, 463 F.2d 21 (5th Cir. 1972), cert. denied, 410 U.S. 966 (1973).

concerns underlying its enactment argue just as forcefully against permitting the use of federal remedies in state court in state tax cases. As this Court has previously noted, the enactment of § 1341 "was motivated in large part by comity concerns." Fair Assessment, 454 U.S. at 110. "[T]he statute has its roots in . . . principles of federalism, and in recognition of the imperative need of a State to administer its own fiscal operations." Tully v. Griffin, 429 U.S. at 74. In particular, Congress was concerned that, by invoking federal remedies, "'taxpayers might escape the procedural requirements imposed by state law'" and thereby disrupt local financing. Rosewell, 450 U.S. at 527; S. Rep. No. 1035, 75th Cong., 1st Sess. 1-2 (1937).

These concerns are equally applicable to state court proceedings contesting state taxes. As recognized by the Georgia Supreme Court, in refusing to permit a taxpayer to circumvent state administrative and judicial remedies by seeking relief under § 1983, "§ 1341 . . . manifests a federal policy of deference to state administrative and judicial remedies in matters of state taxation that bars a claim for a tax refund under § 1983."[11/] Indeed, if taxpayers in state court proceedings were permitted to by-pass state procedural requirements merely by invoking § 1983, Congress' intent in enacting § 1341--that state

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11/ Backus v. Chilivis, 224 S.E.2d at 374; see also State Tax Comm'n v. Fondren, 387 So.2d 712, 723 (Miss. 1980), cert. denied sub nom. Redd v. Lambert, 450 U.S. 926 (1981).

remedies be used to contest state taxes--would be totally frustrated.

Thus, in enacting § 1341, Congress created an exception to the assumption of inadequate state remedies underlying § 1983. Those two statutes, construed together,[12] evince the congressional intent that while a federal remedy generally should be available to enforce federal law, no federal remedy is permissible in cases challenging state taxes where a "plain, speedy and efficient remedy" is available under state law. The purpose of § 1983--to afford a federal remedy where "state courts were unable or unwilling to protect federal rights," Haring v. Prosise, 462 U.S. at 306--is not served by providing a federal remedy where state courts are willing and able to protect federal rights. And the purpose of § 1341--to prevent unnecessary disruption of state tax proceedings--is also ill-served by permitting taxpayers to seek federal remedies in such proceedings.

Given this congressional intent that an adequate state remedy, such as the one employed here,[13] be the exclusive remedy for challenging the validity of a state tax, it follows, under the same

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12/ See Kokoszka v. Belford, 417 U.S. 642, 651 (1974) (when interpreting a statute Court looks not merely to statute in question but also to other statutes in order to effectuate legislative intent); NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 194 (1967) (later act may limit reach of earlier act's vague language).

13/ Petitioners do not challenge the adequacy of the state court remedy for vindicating federal constitutional rights in tax cases, nor could they, since the adequacy of that remedy is evident from the results of this case--a state tax statute was struck down by a state court on federal constitutional grounds.

rationale applied by this Court in Pennhurst, Sea Clammers, and Smith v. Robinson, that actions challenging the validity of a state tax dc not fall within the ambit of § 1983 as properly construed. As in Sea Clammers, the existence of other remedies, to which Congress expressly deferred, demonstrates that Congress "intended to supplant any remedy that otherwise would be available under § 1983." Id. at 21. Therefore, §§ 1983 and 1988 should not be construed to apply to cases such as this.

B. Congress Did Not Intend § 1983 to Be Used to Enforce the Privileges and Immunities Clause.

A second exception to the coverage of § 1983 that has been recognized by this Court is that not all federal statutes or constitutional provisions create "rights secured" by federal law, within the meaning of § 1983. Pennhurst, 451

U.S. at 28. Again, the crucial question is one of congressional intent. Id. at 15.

Historically, § 1983 was intended by Congress to enforce the provisions of the Fourteenth Amendment to the United States Constitution. Monroe v. Pape, 365 U.S. at 171; Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 611 (1979). Accordingly, the Fourteenth Amendment is the "centerpiece" of the statute, Mitchum v. Foster, 407 U.S. at 238-39; and the constitutional rights enforceable under § 1983 are those rights guaranteed by the Fourteenth Amendment.14/

14/ Developments in the Law, Section 1983 and Federalism, 90 Harv. L. Rev. 1133, 1135, 1169 (1977); cf. Carter v. Greenhow, 114 U.S. 317 (1885) (violation of Contract Clause not actionable under

(footnote continued)

Those rights do not include those protected by the Privileges and Immunities Clause of Article IV. Despite the similar wording of that clause and the Fourteenth Amendment itself (which also refers to "privileges or immunities"), these two clauses have widely differing and mutually exclusive applications. J. Nowak, R. Rotunda, J. Young, Constitutional Law 414 (2d ed. 1983); L. Tribe, American Constitutional Law §§ 7-2, 7-4 (1978). Ever since the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873), it has been well-established that the privileges or immunities pro-

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predecessor of § 1983); Chapman v. Houston Welfare Rights Org., 441 U.S. at 615 (violation of Supremacy Clause not actionable under § 1983); Consol. Freightways Corp. v. Kassel, 730 F.2d 1139, 1145 (8th Cir.), cert. denied, 105 S. Ct. 126 (1984) (violation of Commerce Clause not actionable under § 1983).

tected by the Fourteenth Amendment are only those rights peculiar to being a citizen of the United States, such as the right to vote in a federal election. Id. at 74, 79. The privileges and immunities protected by Article IV, on the other hand, comprehend all the privileges and immunities of state citizenship, such as the right to acquire and possess property, which are not protected by the Fourteenth Amendment. Id. at 74, 77. As noted by one scholar, "the Slaughter-house holding . . . removed from the purview of the [Privileges or Immunities] clause [of the Fourteenth Amendment] every civil right traditionally associated with state protection." L. Tribe, American Constitutional Law § 7-4.

It is also pertinent to note that the Privileges and Immunities Clause of Article IV, like the Commerce Clause of

Article I, historically was designed to protect the privileges of trade and commerce and to assure national uniformity in such matters.[15/] As previously explained by this Court, the similarity between the Commerce Clause and the Privileges and Immunities Clause of Article IV "stems from their common origin in the Fourth Article of the Articles of Confederation and their shared vision of federalism." Hicklin v. Orbeck, 437 U.S. at 531-32. Since the Privileges and Immunities Clause was intended primarily to protect the national interest in an efficient economy, rather than the individual rights of citizens who might

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15/ Hicklin v. Orbeck, 437 U.S. 518, 531-32 (1978); United Bldg. & Constr. Trades Council v. Mayor & Council of Camden, 104 S. Ct. 1020, 1026, 1028 (1984); L. Tribe, American Constitutional Law 36 (Supp. 1979); Eule, Laying the Dormant Commerce Clause to Rest, 91 Yale L.J. 425 (1982).

benefit indirectly from this protection, it should not be construed as creating rights "secured" by the Constitution, within the meaning of § 1983. See Consolidated Freightways Corp. v. Kassel, 730 F.2d at 1144-45. Accordingly, violations of the Privileges and Immunities Clause are not actionable under § 1983.

An additional reason that the rights at stake here are not enforceable under § 1983 is that the right not to be subjected to an illegal tax is not the type of right protected by the Fourteenth Amendment. Although this Court has, in general, rejected the distinction between personal and property rights for purposes of Fourteenth Amendment analysis, Lynch v. Household Finance Corp., 405 U.S. 538, 543 (1972), it has expressly preserved that distinction with respect to cases

involving constitutional challenges to state taxation, "a subject governed by unique considerations." Id. at 543 n. 6.[16] Thus in tax cases, where property rights rather than personal rights are at stake, § 1983 was not intended to apply.[17]

16/ Although the Lynch case was construing 28 U.S.C. § 1343 rather than 42 U.S.C. § 1983, its holding and analysis are equally applicable to § 1983, since the Court expressly noted that "[d]espite the different wording of [§ 1983] and [§ 1343], when the § 1983 claim alleges constitutional violations . . . both sections are construed identically" (emphasis added). Id. at 544 n. 7. Cf. Maine v. Thiboutot, 448 U.S. 1 (1980) (construing § 1983 more broadly than § 1343 where the § 1983 claim alleges statutory violations).

17/ See Hornbeak v. Hamm, 283 F. Supp. 549 (M.D. Ala.), aff'd, 393 U.S. 9 (1968); Backus v. Chilivis, 224 S.E.2d at 374; Consol. Freightways Corp. v. Kassel, 730 F.2d at 1146; see also Boland v. City of Rapid City, 315 N.W.2d 496 (S.D. 1982) (inverse condemnation claim

(footnote continued)

C. Congress Did Not Intend § 1983 to Apply to Actions Against a State.

Section § 1983, by its express terms, applies only to a "person" who subjects someone to the deprivation of rights secured by federal law. Although this Court has never expressly stated that a state is not a "person" for purposes of liability under § 1983, its holding in Quern v. Jordan, strongly intimates that conclusion, 440 U.S. at 365 (Brennan, J., concurring) ("the Court resolutely opines that a State is not a 'person' for purposes of § 1983"), which has also

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(footnote continued)

not actionable under § 1983); First Nat'l Bank v. Marquette Nat'l Bank, 636 F.2d 195 (8th Cir. 1980), cert. denied, 450 U.S. 1042 (1981) (violation of federal statute protecting property rather than personal rights not actionable under § 1983).

been drawn by most state courts that have considered the question.[18/]

The conclusion that § 1983 does not apply to suits against states is consistent with the congressional intent underlying that statute, as explicated by this Court. In Quern v. Jordan, 440 U.S. at 341, the Court was "simply . . . unwilling to believe . . . that Congress intended by the general language of § 1983 to override the traditional sovereign immunity of the States." The

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18/ See, e.g., Edgar v. State, 92 Wash. 2d 217, 595 P.2d 534 (1979), cert. denied, 444 U.S. 1077 (1980); Boldt v. State, 101 Wis.2d 566, 305 N.W.2d 133, 143, cert. denied, 454 U.S. 973 (1981); State v. Green, 633 P.2d 1381 (Alaska 1981); De Bleecker v. Montgomery County, 292 Md. 498, 438 A.2d 1348 (1982); Woodbridge v. Worcester State Hosp., 384 Mass. 38, 45 n. 7, 423 N.E.2d 782 (1981).

This question generally does not arise in federal court, where suits against states are barred, in any event, by the Eleventh Amendment. Quern v. Jordan, 440 U.S. at 338-45.

Court's refusal to infer any intent to override the states' sovereign immunity was based on a careful examination of circumstances surrounding the adoption of the Fourteenth Amendment and from the legislative history of § 1983 itself. Id. at 343-44.

Although the immunity directly at issue in Quern was the immunity from suit in federal court guaranteed to the states by the Eleventh Amendment, the logic and historical analysis underlying the Court's holding is equally applicable to the states' sovereign immunity from suit in their own courts, surely one of the most "traditional" dimensions of state sovereign immunity. See also Thiboutot v. State, 405 A.2d 230, 236-37 (Me. 1979), aff'd sub nom. Maine v. Thiboutot, 448 U.S. 1 (1980). The immunity of states from suit in their own courts has

long been recognized by this Court as one of the attributes of state sovereignty inherent in our federal system.[19] That immunity derives not from the Eleventh Amendment or any other particular constitutional provision, but from the general understandings underlying and predating the Constitution.[20]

Nor did the framers intend to abrogate the states' sovereign immunity in adopting the Constitution.[21] To the

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19/ See, e.g., Palmer v. Ohio, 248 U.S. 32, 34 (1918); Hopkins v. Clemson Agricultural College, 221 U.S. 636, 642 (1911); Cunningham v. Macon & Brunswick R.R. Co., 109 U.S. 446, 451 (1883).

20/ Monaco v. Miss., 292 U.S. 313, 322-23 (1934); Ex parte N.Y., 256 U.S. 490, 497 (1921).

21/ Hans v. La., 134 U.S. 1, 13-18 (1890); see also Liberman, State Sovereign Immunity in Suits to Enforce Federal Rights, 1977 Wash. U.L.Q. 195, 202.

contrary, in the debates preceding ratification, John Marshall flatly stated: "It is not rational to suppose that the sovereign power [of a state] should be dragged before a court."[22] Alexander Hamilton expressed similar sentiments in The Federalist No. 81, quoted in Edelman v. Jordan, 415 U.S. 651, 661 n. 9 (1974).

The vague language of § 1983 certainly does not constitute a statement of sufficient clarity to overcome the states' traditional sovereign immunity from suit, particularly in the sensitive

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22/ 3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 555-56 (J. Elliot ed. 1836), quoted in Field, The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One, 126 U. Pa. L. Rev. 515, 528-29 (1977).

area of state taxation.[23] As recognized in Hutto v. Finney, 437 U.S. 678, 697 n. 27 (1978), such a clear statement of congressional intent to abrogate the states' immunity is required in order to "insure . . . that Congress has not imposed 'enormous fiscal burdens on the States' without careful thought."

There can be no doubt that an action seeking a refund of allegedly unconstitutional state taxes is an action against the state itself, regardless of the identity of the named defendants. Ford

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23/ Ford Motor Co. v. Dep't of Treasury, 323 U.S. 459, 465 (1945); Employees of the Dep't of Pub. Health & Welfare v. Dep't of Pub. Health & Welfare, 411 U.S. 279, 285 (1973) (clear statement of congressional intent required to abrogate states' immunity from suit, not found in § 1983); Quern v. Jordan, 440 U.S. at 345 n. 16; Sandalow, supra at 207.

Motor Co. v. Department of Treasury, 323 U.S. at 464; Hopkins v. Clemson Agricultural College, 221 U.S. at 642. Since § 1983 was not intended to encompass actions against states, this action does not fall within the intended scope of § 1983; and since this case was therefore not an action to enforce the provisions of § 1983, no attorney's fees were available under § 1988. Smith v. Robinson, 104 S. Ct. at 3471.[24]

II. THE SOUTH CAROLINA COURT WAS NOT REQUIRED TO ADJUDICATE PETITIONERS' § 1983 CLAIM.

Assuming, contrary to the arguments made in the preceding section, that pe-

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24/ Since for the reasons discussed above, § 1983 could not be used as a remedy for petitioners' constitutional claim, the substantiality of that claim is immaterial. See Smith v. Robinson, 104 S. Ct. at 3469 ("Congress intended to preclude reliance on § 1983 as a remedy for a substantial equal protection claim" (emphasis added) to a free appropriate public education).

titioners stated a claim cognizable under § 1983, the South Carolina court had no constitutional obligation to adjudicate that claim.

A. The South Carolina Court Did Not Decline to Enforce the Federal Constitution.

Before discussing to what extent state courts are obligated to enforce federal law, it must be emphasized that the state court in this case did not decline to enforce substantive federal rights. To the contrary, the state court relied solely on petitioners' federal constitutional claim in ruling in their favor. That it did so pursuant to a state statutory remedy providing for a refund of state taxes "wrongfully or illegally collected for any reason going to the merits," S.C. Code Ann. § 12-47-220, rather than pursuant to the

remedy afforded by § 1983, is of no constitutional consequence.

It is well-settled that § 1983 itself provides no substantive federal rights. As stated by this Court,

> No matter how broad the [§1983] cause of action may be, the breadth of its cover- age does not alter its proce- dural character. . . . [I]t remains true that one cannot go into court and claim a "violation of § 1983"--for § 1983 by itself does not pro- tect anyone against anything.

Chapman v. Houston Welfare Rights Organization, 441 U.S. at 617. Since § 1983 creates no rights, petitioners cannot successfully contend that by declining to address their § 1983 claim, the state court violated its obligation under the Supremacy Clause to enforce their "rights" under § 1983. See Petitioners' Brief at 20-31.

The only substantive federal rights involved in this case are the petitioners' constitutional rights under the Privileges and Immunities Clause.[25] With respect to those rights, the state court certainly cannot be charged with having violated its obligations under the Supremacy Clause, since it refused to enforce a state law that it found to be inconsistent with the federal constitution--precisely what the Supremacy Clause requires. As recognized by Justice Frankfurter, concurring in the judgment in Brown v. Gerdes, 321 U.S. 178, 193 (1944):

> The federal law in any field within which Congress is empowered to legislate is the supreme law of the land in the sense that it may supplant state legislation in that field, but not in the sense that it may supplant the existing rules of litigation in the state courts. Congress has full power to provide its own courts for litigating federal rights. The state courts belong to the States.[26]

To admit that state courts have a duty to protect federal rights does not necessarily lead to the inescapable conclusion that they must do so pursuant to § 1983.

This crucial distinction--between declining to enforce substantive federal rights (which the Supremacy Clause admit-

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25/ Compare Testa v. Katt, 330 U.S. 386 (1947), FERC v. Miss., 456 U.S. 742 (1982), and other cased relied upon at Petitioners' Brief at 20-31, in which substantive federal statutory rights were involved.

26/ See also Liberman, supra at 195 ("State courts, contrary to a literal reading of the supremacy clause, are not compelled to enforce federal rights except to the extent that they arise in connection with state law claims."); Brown v. Hornbeck, 54 Md. App. 404, 458 A.2d 900, 904 (1983) (state court did not need to rely on § 1983 to adjudicate equal protection claim).

tedly requires) and declining to provide a federal remedy where a constitutionally adequate state remedy exists--is understandably glossed over by the petitioners, since recognition of this distinction undermines the constitutional foundation of their entire argument. Since in this case federal law (the Privileges and Immunities Clause) was accorded the supremacy over state law (S.C. Code Ann. § 12-7-750) required by the Constitution, the state court's judgment raises no Supremacy Clause concerns and therefore should be affirmed without reaching the issues discussed below.

B. Congress Did Not Intend to Require State Courts to Entertain § 1983 Claims in Tax Cases Against the State.

This Court has never held that state courts are required to assume jurisdic-

tion over any kind of § 1983 claims.[27] See Martinez v. California, 444 U.S. 277, 283 n. 7 (1980); Maine v. Thiboutot, 448 U.S. at 3 n. 1. Nor are the amici aware of any other court holding that state court jurisdiction over § 1983 claims is required in a tax case against the state.[28] Rather, the state

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27/ Claflin v. Houseman, 93 U.S. 130 (1876), and The Federalist No. 82, relied upon by petitioners, Petitioners' Brief at 22-24, "were concerned with whether state courts may take jurisdiction [over federal claims], not with whether they must do so." P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, Hart & Wechsler's The Federal Courts and the Federal System 434 (2d ed. 1973).

Indeed, in Claflin itself the Court recognized, without any adverse comment, that "it is true that State courts have, in certain instances, declined to exercise the juridiction conferred upon them."

28/ None of the cases cited by petitioners for the proposition that state courts must enforce § 1983 are tax cases.

(footnote continued)

courts, in addition to those of South Carolina, that have considered whether they are required to entertain § 1983 claims in tax cases have held that they are not required to do so.[29/] Backus v. Chilivis, 224 S.E.2d at 374; State Tax Commission v. Fondren, 387 So.2d at 723. No such requirement should be found to exist here, since neither the plain language nor the legislative history of § 1983 indicates that Congress intended to require state courts to adjudicate § 1983 claims in state tax cases. Unlike the federal statutes at issue in the cases relied upon by the petitioners, § 1983 does not even mention concurrent state court jurisdiction, much less expressly require it.[30/] Thus it cannot be said that § 1983 on its face manifests

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(footnote continued)

Rather, they are all traditional civil rights cases concerning police misconduct or prisoners' rights. See Petitioners' Brief at 37 n. 9. Most state courts have willingly assumed jurisdiction over § 1983 claims, at least in traditional civil rights cases. See Petitioners' Brief, Appendix B.

29/ It is, of course, not necessary to determine whether state courts are generally required to assume jurisdiction over § 1983 claims in order to resolve the narrower question presented by the present state tax case. See Backus v. Chilivis, 224 S.E.2d at 373.

30/ Cf. Testa v. Katt, 330 U.S. at 387 (Emergency Price Control Act expressly provides that federal district courts shall have jurisdiction "concurrently with State and Territorial courts"); FERC v. Miss., 456 U.S. at 750-51 (PURPA expressly requires state administrative tribunals to enforce rights granted by that statute); Mondou v. N.Y., New Haven & Hartford R.R. Co., 223 U.S. 1, 56 (1912); McKnett v. St. Louis & San Francisco Ry. Co., 292 U.S. 230 (1934); Douglas v. N.Y., New Haven & Hartford R.R. Co., 279 U.S. 377 (1929) (FELA provides that "jurisdiction of federal courts shall be concurrent with that of the courts of several states").

"a congressional determination" that it be enforceable in state court. Cf. FERC v. Mississippi, 456 U.S. at 761.

Absent any express mention of state court jurisdiction in § 1983, no congressional intent to require such jurisdiction in tax cases may be inferred, see Redish & Muench, Adjudication of Federal Causes of Action in State Court, 75 Mich. L. Rev. 311, 348 (1976), particularly in light of the intrusion on the sovereignty of the state judiciary that would follow from such an inference. See Interest of Amici Curiae and section IC, supra. As one scholar concluded, "In the absence of a declaration by Congress that state courts must enforce rights that Congress has created, there appears to be no substantial reason why the Supreme Court should impose such an

obligation."[31/] Not only does § 1983 lack any clear statement of intent to require state courts to hear claims under that statute in tax cases, but no inference of such intent can be drawn from the legislative history. Section 1983 was not intended to mandate state courts to hear federal claims. Quite the contrary, as discussed in section IA, supra, the statute was premised on the unwillingness or inability of state courts to protect federal rights in the aftermath

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31/ Sandalow, supra at 207. See also Tribe, Intergovernmental Immunities in Litigation, Taxation & Regulation: Separation of Powers Issues in Controversies About Federalism, 89 Harv. L. Rev. 682, 694, n. 68, 695 (1976) ("courts should not abrogate state immunity unless they are sure that Congress has considered the federalism interests compromised by suits against states").

of the Civil War.[32] Primarily for that reason, that statute sought to provide a federal-court remedy for violation of federal rights.[33] Given this congressional understanding, it would be illogical, at best, to hold that a state court is required to entertain a cause of action that owes its very existence to congressional recognition of the

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32/ See Haring v. Prosise, 462 U.S. at 306 (quoting from Allen v. McCurry, 449 U.S. 90, 98-99 (1980)) ("one of the central concerns which motivated the enactment of § 1983 [was] . . . the grave congressional concern that the state courts had been deficient in protecting federal rights").

33/ See id. (quoting Allen v. McCurry, 449 U.S. at 101) ("the 'understanding of § 1983' that 'the federal courts could step in where the state courts were unable or unwilling to protect federal rights'"); see also D.C. v. Carter, 409 U.S. 418, 427 (1973); Monroe v. Pape, 365 U.S. at 180; Mitchum v. Foster, 407 U.S. at 239-42; Developments in the Law, Section 1983 & Federalism, supra at 1135.

state courts' reluctance or refusal to do so.

Nor can congressional intent to require state courts to hear § 1983 claims in tax cases be inferred from 28 U.S.C. § 1341. Although, as discussed in section IA, supra, that statute was intended to relegate taxpayers challenging the validity of state taxes to state remedies, there is no indication that Congress intended to require state courts to provide a remedy under § 1983. To the contrary, Congress appears to have assumed, in enacting § 1341, that § 1983 remedies might not be available in state court, since, if that remedy were mandated in state court, there would have been no need to require, as a condition to precluding federal court jurisdiction, that "a plain, speedy and efficient

remedy" be available in the state courts.[34/]

Furthermore, in enacting § 1341, Congress was well aware that the statute would subject taxpayers to state tax refund schemes like that of South Carolina,[35/] yet it did not require state courts to provide more comprehensive remedies, such as those provided by § 1983. Rather, all that is required for purposes of § 1341 is a "'full hearing and judicial determination' at which [the taxpayer] may raise any and all constitutional objections to the tax." Rosewell, 450 U.S. at 512. The unavailabil-

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34/ See Platt v. Union Pac. R.R. Co., 99 U.S. 48 (1879) (legislature is presumed to have used no unnecessary or superfluous words in statute).

35/ S. Rep. No. 1035, 75th Cong., 1st Sess. 1 (1937); H.R. Rep. No. 1503, 75th Cong., 1st Sess. 2 (1937); Cal. v. Grace Brethren Church, 457 U.S. 393, 412 n. 28, 416 (1982).

ity of interest on the example, is not sufficient to render a state remedy inadequate, nor is the unavailability of attorney's fees. Redd v. Lambert, 522 F. Supp. 608, 610 (N.D. Miss. 1981), aff'd, 674 F.2d 1032 (5th Cir. 1982).

Requiring state courts to provide a federal remedy where state remedies are adequate would also be directly contrary to the principles of comity and federalism underlying § 1341. See Fair Assessment, 454 U.S. at 103. If those principles or the provisions of § 1341 itself preclude even federal court jurisdiction over § 1983 claims in state tax cases, there is no reason to infer that Congress intended to require state courts, which were historically viewed as less competent to adjudicate federal claims, to provide a federal remedy in such

cases. See State Tax Commission v. Fondren, 387 So. 2d at 723.

In sum, neither the plain language of § 1983 nor the legislative intent underlying that statute or 28 U.S.C. § 1341 permit the inference that Congress intended to require state courts to entertain § 1983 claims in tax cases.

C. The State Court Had Several "Valid Excuses" for Declining to Entertain Petitioners' § 1983 Claim.

As this Court has repeatedly recognized, even where Congress expressly confers concurrent jurisdiction on state courts, state courts may decline to exercise that jurisdiction, without violating the Supremacy Clause, if they have a nondiscriminatory, "valid excuse" for

doing so.[36/] In general, the "valid excuse" doctrine has been applied "in circumstances where requiring the state courts to hear a federal case would unduly burden state resources without serving an overriding federal interest." Redish & Muench, supra at 344, 354. As will be shown in this section, the South Carolina courts had a number of valid excuses for declining to entertain petitioners' § 1983 claim in this case.

The first legitimate reason for declining to entertain the § 1983 claim in this case is that to do so would violate

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36/ Douglas v. N.Y., New Haven & Hartford R.R. Co., 279 U.S. at 388; Mo. v. Mayfield, 340 U.S. 1, 4 (1950).

the state's sovereign immunity.[37] Unlike in Testa and other cases relied upon by the petitioners, this case, seeking a refund of state taxes, is a private action against the state itself, which is therefore barred by the doctrine of sovereign immunity. See section IC, supra. Although by enacting S.C. Code Ann. § 12-47-220, the state has consented to be sued for tax refunds, that consent must be limited to its express terms, and may not be construed to permit actions under § 1983, in which the conditions and procedural limitations on the

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37/ The state of South Carolina has not abolished its sovereign immunity by statute or by judicial decision. Copeland v. Housing Auth., 316 S.E.2d 408 (S.C. 1984).

state's waiver of immunity could be ignored.[38]

The validity of sovereign immunity as a bar to state-court jurisdiction over federal claims, including those brought under § 1983, has previously been recognized by this and other courts.[39] This rationale for declining jurisdiction is particularly valid here because of the burden such jurisdiction would impose

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38/ See Hans v. La., 134 U.S. at 17 (state "may prescribe the terms and conditions on which it consents to be sued"); see also Ford Motor Co. v. Dep't of Treasury, 323 U.S. at 465-66.

39/ See Palmer v. Ohio, 248 U.S. at 34; Ga. R.R. & Banking Co. v. Musgrove, 335 U.S. 900 (1949); Fitzpatrick v. Bitzer, 519 F.2d 559, 571 n. 22 (2d Cir. 1975), aff'd in part, rev'd in part, 427 U.S. 445 (1976); De Bleecker v. Montgomery County, 438 A. 2d at 1356 n. 4; Kristensen v. Strinden, 343 N.W.2d 67, 76 (N.D. 1983); Thiboutot v. State, 405 A.2d at 237; Woodbridge v. Worcester State Hosp., 384 Mass. at 38, 44.

on state courts and because such jurisdiction would not only fail to serve an overriding federal interest, it would also run contrary to the federally recognized interest in state sovereignty, particularly in the sensitive area of state taxation. See Interest of Amici Curiae, supra; see also Redish & Muench, supra at 344, 354. Where, as here, the substantive federal right involved (Article IV privileges and immunities) is adequately protected by a state remedy, declining to afford a federal remedy is not "inimical to the federal substantive policy expressed in the federal cause of action."[40/] Redish & Muench, supra at 357.

40/ As discussed in section IB, supra, § 1983 creates no substantive rights.

Nor does this rationale for declining jurisdiction discriminate against federal claims, since a state's immunity from suit applies equally to state and federal claims. Cf. McKnett v. St. Louis & San Francisco Railway Co., 292 U.S. at 234. As one scholar rhetorically asked, "How can a state be charged with discriminating against a federal claim when it allows no suits in state courts against a sovereign?" Tribe, Intergovernmental Immunities, supra at 692 n. 62.

A second "valid excuse" for declining jurisdiction here is based on the Tenth Amendment. Although the precise parameters of state sovereignty preserved by that amendment remain unclear,[41/] the

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41/ See Garcia v. San Antonio Metropolitan Transit Auth., 104 S. Ct. 3582 (1984) (ordering parties to brief the

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attributes of state sovereignty involved here--the power to tax, the power to control the jurisdiction of state courts, and the immunity from suit without consent--would be "indisputabl[e] attributes of state sovereignty," Hodel v. Virginia Surface Mining & Reclamation Association, 452 U.S. 264, 287-88 (1981), under any test the Court might articulate.[42] Since those attributes of sovereignty

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issue of whether or not the principles of the Tenth Amendment as set forth in Nat'l League of Cities v. Usery, 426 U.S. 833 (1976), should be reconsidered),

42/ See, Hamilton, The Federalist No. 81, quoted in Edelman v. Jordan 415 U.S. at 661 n. 9 ("inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent); Fair Assessment, 454 U.S. at 102 ("important and sensitive nature of state tax systems"); M'Culloch v. Md., 17 U.S. (4 Wheat.) 316 (1819) ("power of taxing

(footnote continued)

would be impaired by requiring state court jurisdiction over § 1983 claims, see Interest of Amici Curiae, supra, a valid excuse for declining such jurisdiction exists.[43]

(footnote continued)

. . . is an incident of sovereignty"); Prigg v. Pa., 41 U.S. (16 Pet.) 539, 614 (1842) ("every state . . . has the exclusive right to prescribe the remedies in its own tribunals"); Brown v. Gerdes, 321 U.S. at 190 (Frankfurter, J., concurring) ("whether a state court can take jurisdiction . . . [is] wholly within the control of the State creating the court and without the power of Congress").

43/ See Tribe, Intergovernmental Immunities, supra at 694-97; Redish & Muench, supra at 344; Note, State Enforcement of Federally Created Rights, 73 Harv. L. Rev. 1551, 1558 n. 52 (1960); Sandalow, supra at 206-07; Developments in the Law, Section 1983 & Federalism, supra at 1177-80.

A final and equally valid excuse for declining jurisdiction over petitioners' § 1983 claim is that state court jurisdiction over federal claims cannot be required to any greater extent than is federal jurisdiction over the same claims. Since federal jurisdiction over the tax refund claim at issue here would be barred by the Eleventh Amendment, by principles of comity, and by 28 U.S.C. § 1341, the state courts can legitimately decline to hear the same claims wihout creating any Supremacy Clause concerns.[44/] As stated in Missouri v.

44/ See Brillmayer & Underhill, Congressional Obligation to Provide a Forum for Constitutional Claims: Discriminatory Jurisdictional Rules & the Conflict of the Laws, 69 Va. L. Rev. 819, 838 (1983); Gordon & Gross, Justiciability of Federal Claims in State Court, 59 Notre Dame L. Rev. 1145, 1154 (1984); State Tax Commission v. Fondren, 387 So. 2d at 723; Backus v. Chilivis, 224 S.E. 2d at 374.

Mayfield, 340 U.S. at 6 (Jackson, J., concurring), "Certainly a State is under no obligation to provide a court for . . . a . . . cause of action when the Federal Government, which creates the cause of action, frees its own courts within that State from mandatory consideration of the same case."

III. THE STATE COURT ACTED WITHIN THE SCOPE OF ITS DISCRETION IN DECLINING TO AWARD ATTORNEY'S FEES PURSUANT TO 42 U.S.C. § 1988.

Even if the South Carolina court was required to entertain petitioners' § 1983 claim, it does not follow that the court was also required to award attorney's fees under § 1988. Section 1988 on its face does not require that attorney's fees be awarded to every prevailing party but only that "the court, in its discretion, may allow the prevailing party

. . . a reasonable attorney's fee" (emphasis added). As aptly stated in Brown v. Stackler, 612 F.2d 1057, 1059 (7th Cir. 1980), "'may' sometimes means 'won't'".

The legislative history of § 1988 also emphasized the value of judicial discretion in restraining inappropriate fee awards. The House Report states:

> The second feature of the bill is its mandate that fees are only to be allowed in the discretion of the court. Congress has passed many statutes requiring that fees be awarded to a prevailing party. Again the Committee adopted a more moderate approach here . . . .

H.R. Rep. No. 1558, 94th Cong., 2d Sess. 8.[45/] See also Hutto v. Finney, 437 at 709 n. 6 (Powell, J. , concurring) ("there is nothing in the Act that

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45/ Approximately half of the federal fee-shifting statutes are expressly mandatory. M. Derfner & A. Wolf, Court Awarded Attorney Fees ¶ 5.02[2] (1983).

requires the routine imposition of counsel-fee liability on anyone"). As will be shown here, the lower court properly exercised its discretion to deny fees in this case.

First, as in Smith v. Robinson, 104 S. Ct. at 3468 n. 12, the § 1983 claim here "added nothing to petitioners' claims" and "had nothing to do with plaintiff's success." Petitioners prevailed solely on their state-law cause of action, based entirely on the same constitutional claims they sought to raise under § 1983. As recognized in Smith, the fact that petitioners' § 1983 claim was superfluous "provides a . . . basis for denying attorney's fees on the basis of that claim." Id. Indeed, "where it is clear that the claims that provide for attorney's fees had nothing to do with a plaintiff's success,

Hensley v. Eckerhart, [103 S. Ct. 1933 (1983)], requires that fees not be awarded on the basis of those claims" (emphasis added). Id. Under similar circumstances a number of courts have declined to award fees in cases where the § 1983 claim serves no purpose other than as a "conduit" for attorney's fees.[46] As several members of this Court anticipated, requiring that fees be awarded in such circumstances would enable

> ingenious pleaders [to] find ways to recover attorney's fees in almost any suit against a state defendant. Nothing in the legislative history of the Civil Rights Attorney's Fees Awards Act of 1976 suggests that Congress intended to remove so completely the protection of the "American Rule" in suits against state defendants.[47]

A second justification for the discretionary denial of fees in this case derives from the substantive nature of petitioners' underlying claim. Even if that claim falls within the scope of § 1983, but see section I, supra, it is not the type of civil rights claim that § 1988 was primarily intended to encourage. The legislative history of § 1988 clearly indicates that Congress intended not to shift liability for attorney's fees in all cases against state defendants, but to encourage private enforcement of the most "basic" and "fundamental" civil rights.[48]

46/ See, e.g., Anderson v. Thompson, 658 F.2d 1205 (7th Cir. 1981); Roberts v. Mills, 291 Or. 21, 628 P.2d 714, 715 (1981); Brown v. Hornbeck, 458 A.2d at 904.

47/ Maine v. Thiboutot, 448 U.S. at 24-25 (Powell, Burger, & Rehnquist, JJ., dissenting). See also Brown v. Hornbeck, 458 A.2d at 905.

48/ H.R. Rep. No. 1558, 94th Cong., 2d Sess. 9 (1976); S. Rep. No. 1011, 94th

(footnote continued)

Although it is now clear that § 1983 encompasses deprivations of at least some non-civil rights and that such deprivations may give rise to attorney's fees under § 1988, see Maine v. Thiboutot, 448 U.S. at 8-11, it is nevertheless appropriate for courts to give effect to the limited congressional intent underlying § 1988--to protect civil rights--by exercising their discretion to deny fees more readily in non-civil rights cases or cases where the interests at stake

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Cong., 2d Sess. 2, reprinted in 1976 U.S.Code Cong. & Ad. News at 5909-10; 121 Cong. Rec. 26,806 (remarks of Sen. Tunney) (1975); 122 Cong. Rec. 31,472 (remarks of Sen. Kennedy), 35,115 (remarks of Rep. Anderson), 35,124 (remarks of Rep. Railsback); 35,126 (Remarks of Rep. Fish), 35,127 (remarks of Rep. Holtzman) (1976).

are more private than public in nature.[49/] Thus, in this case, which cannot be characterized as a traditional civil rights action, see section IB, supra, the South Carolina court's exercise of its discretion to deny fees was particularly appropriate.

49/ See, e.g., Boland v. City of Rapid City, 315 N.W. 2d at 503; Green v. Carbough, 460 F.Supp 1193, 1194-95 (E.D. Va. 1978); Martin v. Hancock, 466 F.Supp. 454, 455-56 (D. Minn. 1979); Thiboutot v. State, 405 A.2d at 240; Case Comment, Statutory Non-Civil Rights Violations of Section 1983 and Awards of Attorneys' Fees After Maine v. Thiboutot, 61 B.U.L. Rev. 1069, 1087-89 (1981).

CONCLUSION

For all of the reasons discussed above and in the Brief for Respondents, this Court should affirm the judgment of the Supreme Court of South Carolina.

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